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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL GARY ANDERSON, Defendant and Appellant.	A126250 (Solano County Super. Ct. No. FCR232773)

In this appeal from the trial court's revocation of defendant's probation, defendant claims that the trial court erred by failing to consider a Statement of Mitigation (Statement) presented by the defense after the probation revocation hearing, and charges his defense counsel with failing to provide effective representation. We find that neither the court's failure to consider the Statement nor trial counsel's failure to subpoena a witness for the probation violation hearing was prejudicial to defendant. We therefore affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Defendant was charged in a consolidated pleading with two counts of petty theft with prior convictions (Pen. Code, §§ 484, subd. (a), 666), second degree commercial burglary (Pen. Code, § 459), along with enhancements for prior prison terms served (Pen.

[1] In light of defendant's no contest plea and the issues presented on appeal that relate exclusively to the revocation of his probation, we need not recite the facts pertinent to the charged offenses.

Code, § 667.5, subd. (b)), and commission of two of the offenses while released on bail.[2] On February 11, 2008, pursuant to a plea agreement he entered a no contest plea to all of the charged offenses and enhancement allegations, and waived his right to appeal, in exchange for a promise of no initial state prison term and a suspended state prison sentence. The trial court subsequently sentenced defendant in accordance with the plea agreement to a state prison sentence of four years; execution of sentence was suspended and defendant was placed on formal probation for five years upon conditions, among others, that he serve 365 days in county jail, abstain from alcohol and illegal drugs, submit to random drug testing, and successfully complete counseling and therapy in the FACT[3] program.

After defendant was released from county jail custody he was accepted into the FACT program on January 22, 2009. The next month defendant missed group therapy meetings, failed to make adequate progress in the FACT program, engaged in belligerent behavior directed at a program employee, tested positive for cocaine metabolite, and admitted use of cocaine. He also gave an incorrect address when he updated his sex offender registration. At a hearing on April 28, 2009, defendant was found in violation of his probation for a positive drug test and failing to comply with sex offender registration requirements, although no new charges for violation of section 290.015 were filed against him. Defendant's probation was revoked and he was referred to the probation department for a supplemental report.

The supplemental report filed on June 1, 2009, recommended revocation of defendant's probation and imposition of the previously suspended state prison sentence. The report also noted that while defendant was released on bail he was served with an emergency protective order after an arrest for domestic violence. Contrary to the probation department's recommendation, the court subsequently reinstated defendant's probation, but imposed a 90-day jail term as a sanction for the probation violation, with a

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] FACT is the acronym for the Solano County Health and Social Services Department's Forensic Alternative Community Treatment program.

waiver of credits for time served. Defendant was ordered to report to county jail to begin serving his sentence on June 11, 2009.

As directed by the probation department and FACT, defendant was admitted to the Healthy Partnerships drug treatment program on May 4, 2009, but due to difficulties obtaining child care for his young son he did not begin attending the program until May 25, 2009. He was given a drug test the next day, which was found to be "diluted." The Healthy Partnership program did not have funding for an additional test or to discover the reason for the diluted sample. According to the probation department's policy the sample was "treated as positive." On June 4, 2009, Danielle Thompson, a counselor with Healthy Partnerships, sent a "Discharge Summary" form to the probation department that specified the reason for defendant's discharge from the program as, "left before completion – unsatisfactory progress." The discharge summary noted that defendant made no treatment progress, had no vocational or educational achievement, and had a "poor prognosis." The probation department subsequently moved to revoke defendant's probation on the stated grounds of a positive drug test and failure to complete or participate in treatment.

A hearing on the request to revoke probation was held on August 4, 2009. Defendant's probation officer Gabrielle McCamy testified at the hearing that she received notice from Healthy Partnerships that the result of defendant's random drug test taken on May 26th was "diluted" with an unidentified substance. The Healthy Partnerships program could not afford "further testing," so the reason the sample "was diluted" remained unknown. A diluted drug sample is considered positive by the probation department and Healthy Partnerships. McCamy also testified that defendant entered the Healthy Partnerships program on May 4, 2009, but began his treatment on May 25, 2009. Defendant informed McCamy that he did not have child care for his son, but McCamy never told defendant that he could delay his commencement of the program for that reason. According to McCamy, defendant was terminated from the Healthy Partnerships program for "not appearing for treatment," and "then he left due to a jail sentence" he had been ordered to serve. McCamy added that defendant told her he contacted the Healthy

Partnerships program "to let them know he was turning himself in" to serve the 90-day county jail sentence, "and would not be in the program any longer." The probation officer did not know if defendant had also been terminated from the FACT program.

Defendant testified at the probation revocation hearing that he was ordered to begin the Healthy Partnerships program on May 4th, but advised the counselors there of his need to find child care for his son before he began the program. He was told to "take care of the childcare situation," and given a "deadline" by his counselors Raul Vega and Danielle Thompson to begin the program no later than May 25th. If he "did not appear by the 25th," the "program would terminate" him. He began the program on May 25th, and attended three meetings thereafter. He took one drug test on May 25th, and a second the following day. He consumed 25 to 30 ounces of water before the second test because the weather was hot and he was concerned that he would not be able to urinate. Defendant was aware that "you have to pee by 6:00 o'clock" or "be given a dirty" test result. He drank the water so he could urinate, but did not know "that drinking too much water would dilute the test."

Defendant also testified that he advised Danielle Thompson of his upcoming 90-day county jail sentence. She told him that when he commenced his jail term he would "be discharged from the program, not terminated, and that [he] would have to start from the beginning" when he was released.

At the conclusion of the hearing the court found defendant in violation of his probation by "not participating as directed in the counseling and therapy." The matter was continued for sentencing.

On August 27, 2009, four days before the scheduled sentencing hearing, defendant filed the Statement, which challenged the credibility of the "alleged dirty drug test" as merely a "presumptive test" that was "diluted," rather than a "final test" that indicated a positive result. Defendant reiterated that the probation department did not have adequate funds to conduct a final test. The Statement also explained that defendant was "in substantial compliance" with the requirement to attend the Healthy Partnerships program. He participated in the program and was only discharged "due to reporting to county jail

for a probation violation on or around April 9, 2009." According to an attached declaration from defense counsel, Healthy Partnerships counselor Danielle Thompson conveyed to him that "the only reason" for defendant's discharge was his "reporting to jail." An attached letter from defendant's counselor Raul Vega, dated May 29, 2009, stated that defendant called "on a daily basis when he was having problems with child care," and was "an asset in groups" during his brief participation in the Health Partnerships program.

At the sentencing hearing on August 31, 2009, the court referred to the Statement offered by defendant, but found that it was "much like a request for . . . reconsideration of the finding of probation violation." The court declared that the Statement was not filed within 10 days of the probation violation finding as required by Code of Civil Procedure section 1008, and therefore the materials could not be considered. Defense counsel suggested that the materials submitted to the court were "mitigating circumstances" that reflect upon "sentencing." The court found "that there is no jurisdiction to reconsider the finding of probation violation," and proceeded with sentencing. The court further found "there is no longer a basis for awarding probation" to defendant, in light of his previous failures on probation, and ordered execution of the four-year prison term. This appeal followed.

DISCUSSION

I. The Failure of the Trial Court to Consider Defendant's Statement of Mitigation.

Defendant complains that the trial court erred by failing to consider the Statement filed by the defense before the sentencing hearing. Defendant points out that the court seemed to rely on Code of Civil Procedure section 1008 (section 1008) to rule that the Statement, which was found to be tantamount to a motion for reconsideration, had not been timely filed. He asserts that "section 1008 does not apply at all" to criminal proceedings. Defendant maintains that "motions for reconsideration of probation revocation" orders in criminal proceedings "are governed by a different statute, [Penal Code] section 1203.2," which in subdivision (e) specifies that where, as in the present case, judgment was pronounced before revocation, the "order which revoked the

probation may be set aside for good cause within 30 days after the court has notice that the execution of the sentence has commenced."[4] Since defendant's Statement was filed within 30 days after notice that execution of the sentence had commenced under Penal Code section 1203.2, subdivision (e), he argues that the trial court "had jurisdiction to consider it," and failure to do so violated his "right to due process."

While we agree with defendant that Code of Civil Procedure section 1008 has no bearing on the timeliness of a motion for reconsideration filed in a criminal action (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1247 (*Castello*)),[5] we conclude that the trial court's failure to reconsider the finding of a probation violation in light of the matter presented in the Statement was not prejudicial to defendant. The court did not lack fundamental jurisdiction in the case, nor did the mistaken reliance on Code of Civil Procedure section 1008 compromise the structural integrity of the trial so as to require reversal per se. (See *People v. Flood* (1998) 18 Cal.4th 470, 501–502; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1066.) Therefore, we review the error according to the fundamental rule in California that judgments cannot be set aside "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also *People v. Steele* (2000) 83 Cal.App.4th 212, 224.)

We view the error as one of procedural statutory dimension only; it did not affect defendant's due process rights. (See *People v. Baker* (1974) 38 Cal.App.3d 625, 630.) Defendant had ample notice of the probation revocation hearing and the opportunity to present evidence to contest the charge of a probation violation. He also took advantage

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4 Penal Code section 1203.2, subdivision (e) reads: "If probation has been revoked before the judgment has been pronounced, the order revoking probation may be set aside for good cause upon motion made before pronouncement of judgment. If probation has been revoked after the judgment has been pronounced, the judgment and the order which revoked the probation may be set aside for good cause within 30 days after the court has notice that the execution of the sentence has commenced. If an order setting aside the judgment, the revocation of probation, or both is made after the expiration of the probationary period, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction."

5 The decision and reasoning of the court in *Castello* was approved in *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 728–729, and footnote 12.

of the opportunity to present witnesses and documentary evidence, and was represented by counsel who confronted and cross-examined adverse witnesses. (See *People v. Santellanes* (1989) 216 Cal.App.3d 998, 1004.) The error implicates California statutory law, not any federal constitutional right, so the governing test of prejudice is the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182.) Defendant must affirmatively demonstrate prejudice to prevail on appeal. (*In re M.F.* (2008) 161 Cal.App.4th 673, 680; *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1419.) We do not reverse "unless there is a reasonable probability of a result more favorable to defendant if not for the error." (*Dobbins, supra*, at p. 182.)

We are convinced that the information in the Statement, even if considered by the trial court, would not have resulted in a different outcome. All of the material was cumulative to evidence adduced at the hearing on the request to revoke probation held on August 4, 2009. The trial court was already aware from the probation report and testimony at the hearing that the "dirty drug test" resulted from dilution of the sample – which defendant testified was caused by consumption of excessive water – not the presence of any illegal drugs.[6] The Statement added nothing to the evidence on the drug test result. The court also knew the reason for defendant's discharge from the Healthy Partnerships program. Probation officer Gabrielle McCamy testified at the prior hearing that defendant was terminated from the program due to failure to appear for treatment as a result of his obligation to serve a county jail sentence ordered following the previous probation violation. The court heard from defendant that he advised counselor Danielle Thompson of his upcoming 90-day county jail sentence, and she replied that he would be discharged from the program to serve his jail term, and begin anew upon his release. Again, the Statement did not add any new facts that may have been beneficial to defendant.

The only additional information in the Statement was a letter from counselor Raul Vega dated May 29, 2009, that recounted defendant's daily contact with Healthy

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6 We also observe that defendant was found in violation of probation for "not participating as directed in the counseling and therapy," not the positive drug test.

Partnerships to discuss his "problems with child care," and stated that defendant was "an asset in groups" when he participated. Defendant previously testified, however, that he contacted the counselors at Healthy Partnerships "on a daily basis" to update them on his child care predicament, and referred to the letter from Vega which was already part of the court's file.

Defendant argues that even if the material in the Statement was cumulative, it corroborated his prior testimony, which the prosecutor dismissed as "self-serving." Nothing in the record suggests to us, however, that the court discounted defendant's testimony or his explanation of the events that resulted in the probation revocation finding. Even without consideration of the Statement the court was informed of the reasons defendant claimed as an excuse for his noncompliance with probation conditions. As we read the record, the court's finding of a probation violation was not based upon a rejection of defendant's proffered evidence, but rather upon a determination that the reasons given by defendant, even if accepted, did not justify a different finding.

Of even greater significance to us is the fact the information contained in the Statement would not have altered the trial court's decision to revoke defendant's probation. "A court may revoke probation 'if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation . . . .' ([Pen. Code,] § 1203.2, subd. (a).) 'As the language of section 1203.2 would suggest, the determination whether to . . . revoke probation is largely discretionary.' [Citation.]" (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981–982.) Defendant had already received extreme leniency from the trial court. Contrary to the recommendation of the probation department, he was granted probation despite his record of repeated criminality, then had his probation reinstated despite additional blatant violations. The trial court was in no frame of mind to grant defendant further clemency. Defendant's probation was previously reinstated with clear reluctance and reservations. The court expressly advised defendant that "this will be a zero tolerance case" in the future, and added: "From this point forward any violation of any probation order or directive of the

probation officer or any other violation of law will result in a state prison sentence. This is absolutely the last chance."

Defendant's most recent probation violation may not seem momentous or inexplicable, but the evidence demonstrates that he began the Healthy Partnerships program three weeks late, and did not manage to complete the program as required before he was discharged to serve his county jail term. Even if the evidence in the Statement had been considered by the court, the fact of a probation violation was established, and the court was neither inclined to grant defendant absolution from any further noncompliance, nor would have been justified in doing so. When viewed in the context of the entire record, the information in the Statement would not have resulted in a disposition other than revocation of defendant's probation and imposition of the stayed state prison term. Any error associated with the failure of the trial court to consider the Statement was harmless to defendant.

II. The Failure of Defense Counsel to Present Testimony from Drug Counselor Danielle Thompson at the Probation Violation Hearing.

Defendant also claims that his trial counsel provided ineffective representation by failing to consult with Healthy Partnerships drug counselor Danielle Thompson and present her testimony at the probation violation hearing. Defendant asserts that if his attorney had conducted a proper investigation he would have discovered from Thompson that the discharge from the Healthy Partnerships Program was "not due to poor performance," but instead "his upcoming jail term." Defendant adds that counsel's omission was "a failure to investigate important facts," not a "strategic choice," and the absence of Thompson's testimony at the hearing was prejudicial to him.

"The standards for ineffective assistance of counsel claims are well established. 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' [Citation.] To establish a meritorious claim of ineffective assistance, defendant 'must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and

prejudice need not be affirmatively shown [citations] or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.]' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 261; see also *People v. Frye* (1998) 18 Cal.4th 894, 979.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215; see also *In re Jones* (1996) 13 Cal.4th 552, 561.) Further, " 'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728–729.)

We reject defendant's claim of inadequate assistance of counsel for lack of an adequate showing of prejudice. "In any case, when considering a claim of ineffective assistance of counsel, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' [Citation.] A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

For the same reasons that we found the trial court's failure to consider the Statement harmless error, we find no prejudice in counsel's failure to present the testimony of Danielle Thompson. Evidence of the cause of defendant's discharge from the Healthy Partnerships program was offered at the hearing in the form of the testimony of defendant and his probation officer. The court was cognizant of the circumstances that attended defendant's discharge from the program. Thompson's testimony would not have altered the finding that defendant failed to participate in and complete counseling

and therapy. Based upon our review of the evidence before us, we are convinced that the result would have been no more favorable to defendant if counsel had presented Thompson's testimony at the probation violation hearing. (See *People v. Dobbins, supra,* 127 Cal.App.4th 176, 183; *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1556, fn. 7.) Thus, counsel's failure to secure her testimony was not prejudicial to the defense.

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.